Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1408

CHARLES LEE WRIGHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner prays for a Writ of Certiorari to issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on January 30, 1975.

OPINION BELOW

The District Court for the Northern District of Illinois, Eastern Division, did not render an opinion in this case. The Opinion of the Court of Appeals for the Seventh Circuit (not to be published) is appended.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on January 30, 1975, and a copy thereof is appended to this Petition in the Appendix at Page 1a.

A petition for rehearing was denied by the aforesaid Court of Appeals on April 8, 1975, and a copy of the order by which the Petition for Rehearing was denied is appended to this Petition in the Appendix at Page 6a.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented are:

(1) Whether the District Court denied Petitioner his rights under the Fifth and Sixth Amendments to the Constitution by entering a judgment of conviction without proper basis for a determination that the Petitioner understood the nature of the charge.

(2) Whether the total absence of any questions of Petitioner by the trial judge as to whether or not any promises had been made to the Petitioner to induce a plea of guilty was a denial of defendant's rights under the Fifth Amendment to the Constitution of the United States.

(3) Whether the Petitioner is entitled to a new trial because his sentence, based on an involuntary and thus void plea, was entered in derogation of the Constitution and laws of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

The Fifth Amendment and the Sixth Amendment to the Constitution of the United States; 21 U.S.C. § 841(a)(1); and Rule 11 of the Federal Rules of Criminal Procedure are set forth in the Appendix at Pages 35a-36a.

STATEMENT OF THE CASE

This case arises under 21 U.S.C. § 841(a)(1). The basic facts which are not in dispute are as follows:

Charles Lee Wright, the Petitioner, is a resident of Chicago. He is thirty-one years of age. He has a high school education. He has never been convicted of any State felony charge; nor had he ever been indicted or convicted of a federal offense.

Wright was a former bus driver for Chicago Transit Authority. He lost that job and had an appeal pending before the Labor Board to recover his employment.

Wright was never a user of drugs and does not have any prior arrest record involving drugs. He was honorably discharged from the military service.

On January 4, 1974, Petitioner Wright was indicted for distributing heroin. The indictment charged that he violated Section 841(a)(1) of Title 21 of the United States Code by "knowingly and intentionally" distributing approximately 13.78 grams of a mixture containing heroin. The indictment contained one Count.

Petitioner responded to the January 4th indictment by appearing in court on January 21, 1974, without an attorney. The court extended time for him to be present with counsel until January 25th, 1974. On January 25, 1974, Petitioner Wright appeared with counsel and entered a plea of not guilty.

Petitioner Wright again appeared in court on February 15, 1974. After a motion for discovery was heard, the court then set February 26, 1974, as the date for a pre-trial conference.

On February 26, 1974, counsel for Petitioner was present but the Assistant United States Attorney had a matter before another judge which prevented his presence. Wright's counsel and the trial judge conferred in the absence of the Assistant United States Attorney.

During the pre-trial conference the court made exhaustive inquiry into the nature of the charge, the age of the defendant, his background and record, the amount of money involved in the transaction which formed the basis of the charge, and other particulars in the case. At the conclusion of the conference, the court indicated an inclination and disposition to grant the defendant probation in the event the defendant was to plead guilty to the charge, but dependent upon a pre-sentence report.

Petitioner Wright appeared again in court on March 28, 1974. As a result of the pre-trial conference and the representations made to the defendant by his attorney that the judge would grant him probation, the defendant withdrew his plea of not guilty and entered a plea of guilty. The court asked Petitioner Wright his age; whether he understood that he was waiving his right to a trial by jury and to a trial by this court; "whether anyone had

threatened him" (no inquiry was made regarding any promises); that he could be sentenced to fifteen years and fined up to $25,000.00. Wright answered all questions, except about being threatened, in the affirmative, and answered no to the question of any threat. The judge then read portions of the indictment and asked Wright if he did that. Wright answered yes. It is asserted, however, that such procedure was insufficient to establish whether or not Petitioner understood the nature of the charge against him. The court accepted the pleas and entered a judgment of guilty. The court requested a pre-sentence investigation and continued the matter to May 7, 1974.

On May 7, 1974, Petitioner Wright again appeared in court for sentencing. Petitioner informed the court before sentencing that he was not guilty of the crime. Petitioner's counsel addressed the court and reminded the court of the pre-trial conference. He further stated that the judge indicated a disposition or inclination toward probation, but that there was a question of the pre-sentence report. That portion of the pre-sentence report recited into the record revealed a misdemeanor in London, England, for which Wright was fined Twenty-Five Pounds.

Although the indictment charges distribution of a single quantity of heroin, the prosecutor referred to Wright as being possibly "the major supplier, if there is someone to be called the major supplier in this case." (The Record does not contain any other allegations to sustain this interpretation of any criminal conduct by Wright).

The defendant then addressed the court personally and stated that "the charge I am pleading guilty to, my only reason for pleading guilty to it was *not* that I committed the crime."

The judge responded, "Well, you pleaded guilty because you are guilty, aren't you?"

Defendant Wright answered, "No, sir."

The judge: "Well, you were with Weatherspoon. She's already said so." Wright then told the judge he would not have pleaded guilty if he thought she would tell the truth: that the District Attorney had informed him that they wouldn't use Weatherspoon's testimony because her worth would be about thirty percent. He said that, therefore, how could he use her for his defense?

The judge concluded the discussion on the charge by stating to Wright, "Don't ask me those questions. You should have thought of those before you came in here."

The court entered a sentence of three years imprisonment and three years parole. Wright's counsel asked for a suspended sentence, which was denied. Wright requested a chance to speak. The judge responded, "No, you have had your say." After sentencing, the District Court denied the defendant an opportunity to explain to the court that an agreement or promise had been made through his lawyer regarding probation, by ordering him to be removed from the courtroom immediately upon sentencing.

Whereupon, the defendant was remanded to the custody of the Attorney General of the United States for three years, to be followed by the mandatory requirement of three years parole, under supervision of the Parole and Pardon Board.

On May 15, 1974, defendant's attorney filed a motion to reduce sentence, and an affidavit in support thereof. Said motion and affidavit show that the court indicated to defendant's counsel that the court had an inclination and

disposition to grant the defendant probation in the event defendant was to plead guilty to the charge, but dependent upon a pre-sentence report. The pre-sentence report was not unfavorable to the defendant and there is no indication that the District Court judge based his sentence on the results of the pre-sentence report.

Notice of Appeal to the Court of Appeals for the Seventh Circuit was filed on July 1, 1974, and an Amended Notice of Appeal filed on July 5, 1974.

Before the Court of Appeals, the Petitioner presented four arguments. The first argument was that the trial court denied the Petitioner his rights under the Fifth and Sixth Amendments to the Constitution of the United States by entering judgment without any basis for a determination that the Petitioner understood the nature of the charge. The thrust of Petitioner's appeal was that the court did not fulfill the required procedure set forth in Rule 11. Consequently, the Court erred in accepting the plea of guilty. Petitioner's position is that the application of the requirements of Rule 11 were crucial at two stages of the proceeding: (1) when the plea of guilty was offered, the trial judge failed to fulfill the requirements of Rule 11; (2) the day of sentencing hearing, the trial judge ignored the information presented to him which set forth that Defendant believed he was innocent.

It was Petitioner's contention before the Court of Appeals that the accused in a criminal case has a fundamental right to be informed of the nature and cause of the accusation against him. The Sixth Amendment guarantees this right and it is one element of "Due Process of Law" as guaranteed by the Fifth Amendment. In order to implement this right, Congress has formulated Rule 11 to govern the acceptance of guilty pleas.

The Court of Appeals for the Seventh Circuit, in answer to this contention, stated that the charge in this case was not complex, and that since defendant indicated that he understood the charge, and the fact that his counsel was present, were sufficient to satisfy the requirements of Rule 11 regarding the Court's inquiry.

Petitioner's next argument was that the court failed to comply with the requirements of Rule 11 by accepting the plea of guilty without first having determined, while personally addressing the Petitioner, that the plea was voluntary, in that no promises had been made inducing it.

In answer to this contention, the Court of Appeals for the Seventh Circuit cited the same cases, proposed by the Government as authority and did not delve into the ramifications of Rule 11 and its effect upon the Fifth and Sixth Amendment rights of the accused.

The Petitioner's next argument was that the Court abused its discretion in entering judgment after it knew or should have known that the Defendant did not understand the nature of the charge against him, and more particularly, abused its discretion by failing to vacate the plea of guilty after the defendant asserted his innocence. It was Petitioner's contention that the elements involved were highly complex and not commonly known by lay people and were not known by the defendant. The two key elements being (1) a knowledge and intent to distribute the prohibited substance, and (2) an affirmative act of delivery.

The Court of Appeals in dispensing with this argument concluded that the fact that the Petitioner asserted that he was innocent at the sentencing hearing was insufficient

to warrant a finding that the defendant did not understand the nature of the charge or that the plea was not voluntary.

The Petitioner's final argument was that he was entitled to a new trial because his sentence, based on an involuntary and thus void plea, was entered in derogation of the Constitution and laws of the United States. Petitioner contended that relief was warranted because the actions of the trial court violated the Fifth and Sixth Amendments regarding due process. It was the Petitioner's contention that a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary action, is void.

The Court of Appeals, in answer to this argument, stated that despite the Petitioner's protestations of innocence at the sentencing and his attempt to explain the rationale behind his plea of guilty, there was still a sufficient basis to believe the Petitioner's plea of guilty was voluntary, knowing, and entered into understandingly by Petitioner.

REASONS FOR GRANTING THE WRIT

(A)

A CONSTITUTIONAL QUESTION OF GREAT IMPORTANCE AND BROAD APPLICATION IS INVOLVED.

A question of constitutional importance and of broad application is presented by this case. It is the Petitioner's contention that the accused has a fundamental right to be informed of the nature and cause of the accusation. "The Sixth Amendment guarantees this right and it is one element of 'Due Process of Law' as guaranteed by the Fifth Amendment." *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941). This constitutional guarantee of a right to be informed of the nature of an accusation requires that the proceedings in open court show that the defendant has been informed and does in fact understand the nature of the charge. *U.S.* v. *McCarthy*, 394 U.S. 459. In order to implement this right, Congress and the Supreme Court have provided specific procedures for the pre-conviction and the post-conviction stages. These procedures have been embodied in Rule 11 of the Federal Rules of Criminal Procedure. Under Rule 11 (see Appendix, p. 36a) the court must not accept a plea of guilty without first determining that the defendant's plea is made voluntarily with full understanding of the nature and consequences of the plea.

In addition to the United States District Court's duty to ascertain that the defendant fully understands the true nature of the charge against him, the District Court must, before accepting a defendant's plea of guilty, ascertain that the defendant is tendering his plea voluntarily. The

Supreme Court has stated that "a guilty plea must be voluntary and knowing, and if it was induced by promises, the essence of those promises must in some way be made known." *Santobello* v. *New York*, 404 U.S. 257.

In the instant case, the district court did not adequately determine that the Petitioner understood the nature of the charge against him. Specifically, the Petitioner was charged with a violation of Section 841(a)(1) of Title 21 of the United States Code (see Appendix, p. 36a, *supra*) in that he "knowingly, wilfully, and unlawfully possessed and distributed a mixture of heroin." Two elements were essential to the conviction of the Petitioner, under this Section: (1) a knowledge and intent to distribute the prohibited substance; and (2) an affirmative act of delivery. In essence, the crime of which the Petitioner was accused was a specific intent crime. The trial court, prior to accepting the Petitioner's plea of guilty did not question the defendant concerning the elements of the crime charged. In addition, the record in this case does not reflect that any evidence to support the charge was received before the defendant's plea was accepted.

The defendant's protestations of innocence at the sentencing hearing were a key indication that the Petitioner did not understand the nature of the charge against him and that his initial plea of guilty was not knowingly and voluntarily made. The remarks of the defendant preceded any statements by the Government in aggravation of Defendant's guilt. Although Petitioner's counsel made no formal withdrawal of Petitioner's plea of guilty, the protestations of innocence by the Petitioner could reasonably be construed to be his attempt at such a withdrawal.

In the instant case, a conditional promise by the trial judge in pre-trial conference is alleged. Such a promise

can be established either objectively, or subjectively, as understood by the Defendant in his own mind. *United States* v. *Mancusi,* 275 F. Supp. 508, 515-16 (1967). In refutation of this argument, the Government contends that at the time that this case was heard in the District Court, there was no requirement that the District Court inquire of the Petitioner as to whether any promises had been made to him, citing *Moody* v. *United States,* 497 F. 2d 259. However, the Court of Appeals for the 7th Circuit in *Moody* at Page 365, concluded by issuing a directive to the district courts in the circuit to expand their Rule 11 inquiry substantially as follows:

> "I now inquire of the United States Attorney and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the United States Supreme Court has specifically approved plea bargaining and has said that it is an essential component of the administration of justice . . . to be encouraged. You should advise me truthfully and fully of any plea negotiations without the slightest fear of incurring disapproval of this court."

This directive was issued in light of the then "proposed amendment" to Rule 11, which stated in part that if a plea agreement had been reached . . . in expectation that a specific sentence will be imposed . . . the court shall require disclosure of the agreement in open court at the time the plea is offered. This amendment was incorporated into Rule 11 subsequent to the decision in *Moody.*

As was noted, *supra,* the purpose for implementation of Rule 11 by Congress, was an attempt to codify the rights of the accused under the Fifth and Sixth Amendments to the Constitution. The right of an accused, not to have his plea of guilty accepted unless such plea was

tendered (1) knowingly, that is, with full understanding of the true nature of the charge against him, and (1) voluntarily, that is, that the plea was not induced by any threats or promises, was not created by the Amendments to Federal Rule 11, but has been in existence since the inception of the Fifth and Sixth Amendments to the Constitution. The failure by a District Court to thoroughly inquire of the defendant, whether he understood the true nature of the charge against him, and whether the defendant's plea was not induced by threats or promises, would be a violation of that right. *McCarthy* v. *U.S., supra. U.S.* v. *Mancusi, supra.*

(B)

THE DECISION IN THIS CASE IS IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

The decision in this case conflicts with recent decisions of the Supreme Court regarding the acceptance of guilty pleas. In *Santobello* v. *New York,* 404 U.S. 257 at 462, 30 L. Ed. 2d 427, the court held . . . "that the sentencing judge must develop on the record, the factual basis for the plea of guilty. . . The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." Although the promises made in that case were given by the prosecuting attorney, this distraction is not sufficient to take the instant case out of the realm of that decision. The court in *Santobello* stated that the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.

The court, in the instant case, despite the Petitioner's assertions of innocence, and his attempts to explain the

reason for his plea, and in spite of the fact that statements had been made by the trial judge which could reasonably be construed as promises, at least in the subjective state of Petitioner's mind, held that there was no reason to conclude that the Defendant's plea might not have been voluntary and, therefore, an evidentiary hearing was not required.

The Petitioner was not admonished regarding the nature of the charges or the consequences of his plea by either his counsel or the trial judge. Nor did the trial judge at any time on that day or any other day inquire of the defendant if he had been promised a specific sentence. Not only did the court's failure to so inquire into these areas violate the principles established in *Santobello,* but also those elicited in *McCarthy* v. *United States, supra.*

In *McCarthy,* the court held that "the defendant was entitled to plead anew where the court did not inquire of the defendant personally whether he understood the nature and essential elements of the charge against him." This requirement has been embodied in Rule 11. The Supreme Court, in *McCarthy,* stated that independent of any constitutional grounds, a United States District Court may not accept a defendant's guilty plea without fully adhering to the procedure provided in Rule 11.

In summary of its position, the court in *McCarthy* stated, "It is, therefore, not too much to require that before sentencing defendants to years of imprisonment, district court judges should take a few minutes necessary to inform them of their rights and to determine whether they understand the actions they are taking." *McCarthy* v. *United States,* 394 U.S. 454, 472 (1969).

(C)

THIS CASE HIGHLIGHTS A SERIOUS DIVISION AMONG THE COURTS OF APPEAL AS TO THE APPLICATION OF THE RULES OF CRIMINAL PROCEDURE REGARDING ACCEPTANCE OF PLEAS OF GUILTY. REVIEW BY THIS COURT IS NEEDED NOT ONLY TO PROTECT THE PETITIONER'S RIGHTS, BUT TO ASSURE UNIFORM APPLICATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

Substantial conflict now exists by reason of the decision in this case and those of other cases decided in the Circuit Courts of Appeals, and District Courts. In the instant case, the Court of Appeals for the Seventh Circuit has held that where a defendant has entered a plea of guilty, an evidentiary hearing is not required where the defendant subsequently asserts his innocence and attempts to withdraw his plea of guilty, if such a withdrawal is predicated upon allegations of promises of leniency, made to the defendant, which are not supported by the objective facts of the case.

This decision is diametrically opposed to the decision rendered in *United States* v. *Mancusi,* 275 F. 508 (1967), a Second Circuit decision. The court in that case stated that a determination of whether the defendant's guilty plea was voluntary and intelligent must by definition depend upon the Court's view of the defendant's subjective state of mind at the time of the plea. The court held that if at the time the defendant plead guilty, he believed that a promise had been made, though in fact no promise had been made, and the plea had been induced by this belief, it is an involuntary and thus void plea. The court in *Mancusi, supra,* was of the firm conviction that a defendant's subjective belief was a controlling factor in determining

whether or not any promises had been made, thus affecting the voluntariness of the plea.

In the present case, the Court of Appeals, citing *Moody* v. *U.S., supra,* held that a "bare bones" allegation of a promise is not sufficient to trigger an evidentiary hearing. The Court apparently discounted the conference between the District Court judge and the Petitioner's Counsel, as potentially creating an inference in the mind of the Petitioner that a promise of leniency had been made to the Petitioner.

In contrast to this decision, the court in *Scott* v. *United States,* (E.D. Ky.) 190 F.Supp. 470, affd. 292 F. 2d 49, cert. denied, 368 U.S. 874 (1961) held that it is not enough that it appear "improbable" that the plea was made involuntarily or unintelligently, the defendant is entitled to a hearing unless a claim of voluntariness would have been "incredible." The factual situation of the instant case regarding the defendant's subjective belief of a promise of leniency does not lend itself to a classification of incredibility, when viewed in light of the statements made by the District Court judge to Petitioner's trial counsel in the pre-trial conference.

In addition, in the case so heavily relied upon by the Government (*Moody* v. *U.S., supra*), the court believed that an inquiry into the question of whether or not a promise had been made to the defendant should be made, in order to insure uniformity of decisions in the Seventh Circuit.

The holding in Petitioner's case also creates a division among the courts of the various circuits regarding the question of whether a defendant fully understands the nature of the charge against him. In particular, the Ninth Circuit in the case of *Heiden* v. *United States,* 353 F. 2d 53 (1965)

has held that the error of the trial judge in failing to ascertain a defendant's understanding of a charge against him at the time of accepting a plea could not be eliminated by a subsequent hearing. The court there placed the burden of establishing defendant's understanding of the charge upon the Government. The court in the instant case held that Rule 11 does not require any particular ritual to be followed by the court to determine that the defendant understands the nature of the charge against him. The court concluded that since the Petitioner had the indictment read to him and Petitioner stated he understood the crime charged, coupled with the fact that the Petitioner had his counsel present, was sufficient to afford a basis for acceptance of the plea.

However, at the sentencing hearing it became readily apparent that Petitioner did not fully understand either the nature of the charge against him or the consequences of his plea. The Supreme Court has held that ". . . [R]eal notice of the true nature of the charge against him [is] the first and most universally recognized requirement of due process . . ." *Smith* v. *O'Grady,* 312 U.S. 329, 334 (1941).

As was stated previously, the key element of the crime of which Petitioner has been accused is "specific intent." The Petitioner's statements at the sentencing hearing concerning his innocence made it clear that he did not understand the nature of the charge, and at that point the trial judge had the duty to make certain that his plea had been made in a knowing manner.

In addition, Petitioner urges that the presence or absence of counsel, in and of itself, is not sufficient to release the trial judge of his duties under Rule 11. In *Halliday* v. *United States,* 280 F. 2d 270 (C.A. 1, 1967), the court held

that the mere presence of counsel did not warrant a conclusive finding that a defendant understood the nature of the charge against him.

CONCLUSION

A guilty plea, in order to be valid, must be received by the trial judge in conformity with the mandates of the Fifth and Sixth Amendments to the Constitution of the United States. The substance of this Petition is that the Court failed to follow the procedures outlined by the Supreme Court and Congress in Rule 11, as well as the requirements found by the Supreme Court to exist under the Fifth and Sixth Amendments. The trial court failed to make certain that the Petitioner, Charles Lee Wright, understood the nature of the charge against him. The Record shows that he did not understand it.

The trial judge failed to ascertain whether or not any promises had been made to the Petitioner to induce his plea of guilty. The effect of the trial judge's failure to so inquire as to promises, deprived the Petitioner's plea of the element of voluntariness that is required under the Constitution. Consequently, the Petitioner has been deprived of the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

The decision in this case should be reviewed, not only because of the Constitutional ramifications of the Seventh Circuit's decision, but also because of the fact that the court has failed to follow the mandates of the Supreme Court. In addition, the decision should be reviewed because of the conflict it creates between the decisions of the various

courts on the critical aspect of the administration of criminal justice in the Federal courts.

It is, therefore, respectfully urged that a Writ of Certiorari to the Seventh Circuit be granted herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

(Argued October 23, 1974)
January 30, 1975.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. JOHN F. KILKENNY,* *Senior Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 74-1549 vs. CHARLES LEE WRIGHT, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (74 CR 6) WILLIAM J. LYNCH, *Judge*

Defendant Charles Lee Wright pleaded guilty to a one count indictment charging him and Verda Mae Weatherspoon with knowingly and intentionally distributing heroin in violation of 21 U.S.C. §841 (a)(1). On appeal, the defendant argues that he is entitled to plead anew because

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* Senior Circuit Judge John F. Kilkenny of the 9th Circuit sitting by designation.

the trial court did not comply with the requirements of Fed. R. Crim. P. 11.[1] We affirm the conviction.

On March 28, 1974 the defendant entered a plea of guilty, and on May 7, was sentenced to three years imprisonment followed by three years parole. On May 15, trial counsel filed a motion to reduce sentence accompanied by an affidavit stating that at a pretrial conference conducted on February 26, 1974, at which only he was present, the court indicated an "inclination and disposition" to grant parole if the defendant pleaded guilty. The affidavit also stated that the court indicated to defense counsel that there was no "binding effect" to the court's inclination. The court denied the motion to reduce sentence on May 22, and defense counsel did not seek to withdraw defendant's guilty plea pursuant to Fed. R. Crim. P. 32(d) or 28 U.S.C. §2255.

Defendant's appellate attorney[2] first argues that the plea was not voluntary because it was induced by a plea bargain that was not fulfilled.[3] This argument is based on the

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[1] That rule provides:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The court must fully adhere to the procedure provided for by the Rule. McCarthy v. United States, 394 U.S. 459, 464 (1969).

[2] The defendant retained new counsel for this appeal.

[3] The district court asked the defendant if he had been threatened, but did not ask if any promises had been made. Although

(footnote continued on following page)

contention that it is "reasonable to infer" (Appellant's Br. at 20) from the affidavit filed by trial counsel that after the February 26 pretrial conference defense counsel conveyed a promise of probation to the defendant and that this promise induced the defendant's plea. Because no motions to withdraw the plea were filed below, the district court did not have an opportunity to rule on this argument. We therefore restrict ourselves to determining whether an evidentiary hearing is required.

In *Moody* v. *United States, supra,* the defendant sought to withdraw his guilty plea by alleging that his counsel had told him that the U.S. Attorney had promised the defendant a certain sentence, and that subsequently this promise was not fulfilled. In finding that the trial court did not abuse its discretion in denying the motion to withdraw the guilty plea without a hearing, we held that there must be detailed and specific factual allegations, and that a "barebones" allegation of a promise is not sufficient to trigger an evidentiary hearing. *Id.* at 362; *see also United States* v. *Lowe,* 367 F.2d 44, 45 (7th Cir. 1966). In the present case, the defendant has made no factual allegations of a promise, and the allegation that any promise was made at all rests on questionable speculation indulged in by the defendant's appellate attorney. *United States* v. *Mancusi,* 275 F. Supp. 508 (E.D.N.Y. 1967), on which defendant's attorney so heavily relies, is distinguishable because there it was found that the facts might justify a finding that defense counsel misled the defendant, and that therefore a hearing was required. Here, there is no reason to conclude that the defendant's plea may not have been voluntarily entered, and accordingly we find that an evidentiary hearing is not required.

The defendant next asserts that Rule 11 was not complied with because the district court did not adequately determine

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now the district court must also inquire as to whether there have been any plea negotiations, that requirement did not exist at the time the plea was entered and sentence imposed in the present case. Moody v. United States, 497 F.2d 359, 365 (7th Cir. 1974).

that he understood the nature of the charges or that there was a factual basis for the plea. We turn first to the latter contention.

The record in this case does not reflect that any evidence to support the charge was received before the defendant's plea was accepted. Although we think it preferable to establish the factual basis before the plea is accepted, the Advisory Committee's notes to Rule 11 state that the court may satisfy itself that a factual basis exists ". . . by examining the presentence report . . . ." 8 J. MOORE'S FEDERAL PRACTICE ¶11.01 [3], at 11-3 (2d ed. 1974). *See also* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §174, at 377-378 (1969); *Turner* v. *United States*, 320 F. Supp. 1204, 1206 (E.D. La. 1970). At the disposition hearing on May 7, the court had before it a presentence report on the defendant. The record of that hearing shows that the court was aware that the report contained information that the defendant had talked to a government agent on the day he was arrested, that he told the agent that further dealings would have to be through Weatherspoon [his codefendant], that he was bringing the stuff over now, and that when the defendant and Weatherspoon arrived, the latter was carrying heroin. This information in the presentence report provided a sufficient factual basis to enable the court to be reasonably satisfied that the defendant was guilty of the crime charged and to thereby meet the requirements of Rule 11. *See Arias* v. *United States*, 484 F.2d 577, 580 (7th Cir. 1973).

The defendant's assertion that the district court did not adequately determine that he understood the nature of the charge is based on two contentions. First, he argues that the reading of the indictment by the court to the defendant was not a sufficient inquiry into the defendant's understanding, and second, that the defendant's assertion at the May 7 disposition hearing that he was not guilty demonstrates that he did not understand the nature of the charges against him.

Rule 11 does not require that any particular ritual be followed by the court to determine that the defendant understands the nature of the charges against him. *McCarthy* v. *United States, supra*, at 467 n.20. The inquiry of the defendant required in each case will depend on all the surrounding circumstances. *Sappington* v. *United States*, 468 F.2d 1378 (8th Cir. 1972), *cert. denied* 411 U.S. 970 (1973). Here, after reading the indictment to the defendant at the hearing on March 28, the court asked the defendant if he did the act charged and whether or not he was pleading guilty to it. The defendant responded affirmatively to both questions. Although we believe it would have been better practice to have more closely questioned the defendant concerning the elements of the crime charged, the charge here was not complex, the defendant indicated that he understood it, and we attach appropriate weight to the presence of counsel. We therefore find that the court's inquiry satisfies the requirement of Rule 11 that the court ascertain that the defendant understand the nature of the charge. *Sappington* v. *United States, supra*, at 1379; *see Arias* v. *United States, supra*, at 580.

Finally, the defendant's assertions at the May 7 sentencing hearing that he was innocent and that he was pleading guilty because his defense was weak do not indicate that the defendant did not understand the nature of the charge or that his plea was not voluntary. Where there exists a factual basis for the plea, a plea of guilty can be found to be voluntarily, knowingly, and understandingly entered even though the defendant asserts his innocence or is simply selecting his least harmful alternative under the circumstances. *North Carolina* v. *Alford*, 400 U.S. 25, 38 (1970); *Brady* v. *United States*, 397 U.S. 742, 749 (1970); *cf. United States ex rel. Dunn* v. *Casscles*, 494 F.2d 397, 400 (2d Cir. 1974). As discussed above, a factual basis for the guilty plea existed, and we find no reason to conclude that the court did not properly retain the plea.

Accordingly, we find that the district court has complied with the requirements of Rule 11, and the judgment of conviction is affirmed.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
April 8, 1975.

Before

Hon. LATHAM CASTLE, *Sr. Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. JOHN F. KILKENNY, *Sr. Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1549 vs.

CHARLES LEE WRIGHT,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(74 CR 6)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be, and the same is hereby, Denied.

APPENDIX C

1 TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the Hon. William J. Lynch, one of the judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Monday, January 21, 1974, at the hour of 10:00 o'clock a.m.

Present:
Hon. James R. Thompson,
United States Attorney, by
Mr. Frank E. Kear,
Assistant U. S. Attorney,
on behalf of the government.

2 The Clerk: 74 CR 8 and 74 CR 6, United States of America v. Verda Mae Weatherspoon, for arraignment and plea, and for separate trial.

Mr. Kear: Good morning, your Honor. Frank Kear, for the government.

Your Honor, on 74 CR 6, a codefendant with Weatherspoon is Mr. Charles Wright. I see him in the courtroom here today, but I don't see his attorney here yet.

The Court: That's on 74 CR 6, isn't it?

Mr. Kear: Yes. On -8, the codefendant has not yet been arrested.

The Court: Charles Lee Wright, come forward please.

You are Verda Mae Weatherspoon?

Defendant Weatherspoon: Yes.

The Court: Let the record reflect that she is here in open court.

Do you have counsel—a lawyer?

Defendant Weatherspoon: He is not here, your Honor.

The Court: But you do have a lawyer?

Defendant Weatherspoon: Yes, I have a lawyer.

The Court: And Mr. Wright, do you have a lawyer?

Defendant Wright: I talked to this attorney that represented me the last time.

The Court: What is his name?

3 Defendant Wright: Mr. Cleveland, but he told me to come in—that we had to renegotiate—and he asked me to ask you would you be kind enough to give me a continuance so that I can see whether he is going to be retained as my lawyer or will I have to get another lawyer.

The Court: Well, that is a reasonable request. I can't give it to you for long, but I will give you an opportunity—and also you—an opportunity to talk to your lawyers.

Friday of this week—Mr. District Attorney?

Mr. Kear: Yes, that is fine, your Honor.

Defendant Weatherspoon: Your Honor—

The Court: Yes, ma'am?

Defendant Weatherspoon: It's hard for me to get in contact with my lawyer because I am incarcerated in the County Jail.

The Court: How much is your bond?

Defendant Weatherspoon: Thirty thousand.

Mr. Kear: Your Honor, bond in this case is forty-five hundred secured, and we understand that she is unable to make bond on a state arrest that has occurred, just prior to this indictment.

The Court: Oh, you have a bond in the state court too. Well, I'm not going to lower it if you have charges in the state and also here.

What lawyer had you talked to, Ms. Weatherspoon?

4 Defendant Weatherspoon: Well, I hadn't talked to no lawyer about this case.

The Court: Well, give her an opportunity to talk to any lawyer she wants to—Mr. Marshal, see that she has contact. She is entitled to that under her rights. I won't let her proceed here today until she has counsel.

I will put it over until Friday at 10:00 o'clock. That's all.

Defendant Wright: Also, sir, could I have permission—my father lives in the southern part of the state, and I would like to go see him because I might need him for some financial assistance.

The Court: Yes.

Mr. Kear: No objection.

The Court: Yes, permission is granted. Keep in touch with the district attorney. If you go any place else—don't go anywhere except to the southern part of the state.

Where are you going, down to East St. Louis?

Defendant Wright: No, sir, Mt. Vernon, Illinois.

The Court: Mt. Vernon. Well, that's a very nice spot.

Defendant Wright: Yes, sir.

The Court: All right, permission granted.

Mr. Kear: Your Honor, would you continue the writ that has brought her in from state custody so that she can be back here Friday?

The Court: Continue it until Friday at 10:00

5 o'clock—the writ will be continued.

All right.

Mr. Kear: Thank you, your Honor.

(Which were all of the proceedings had at the hearing of the within cause on the day and date hereof.)

6 (Certification of Official Court Reporter.)

1 TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the Hon. William J. Lynch, one of the judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, January 25, 1974, at the hour of 10:00 o'clock a.m.

Present:

Hon. James R. Thompson,
United States Attorney, by
Mr. Frank E. Kear,
Assistant U. S. Attorney,
on behalf of the government;
Mr. Herbert E. Cleveland,
on behalf of defendant Wright.

2 The Clerk: 74 CR 6 and 74 CR 8, United States of America v. Charles Lee Wright and Verda Mae Weatherspoon, and Bo Curry and Verda Mae Weatherspoon on 74 CR 8, for arraignment and plea, and to set for trial.

Mr. Cleveland: Good morning, your Honor. My name is Herbert Cleveland. I would like to appear on behalf of the defendant Charles Wright.

The Court: Have you filed your appearance?

Mr. Cleveland: I have, your Honor, at this time.

The Court: Very well, let the record so reflect.

Now, what about Ms. Weatherspoon? She was supposed to get counsel.

Are you Verda Mae Weatherspoon?

Defendant Weatherspoon: Yes, sir.

The Court: Did you get counsel?

Defendant Weatherspoon: Yes, I did.

The Court: What is his name?

Defendant Weatherspoon: Mr. Horton.

The Court: Mr. Horton?

Defendant Weatherspoon: Yes, sir.

The Court: Do you know him, counsel?

Mr. Cleveland: No, sir.

The Court: I don't either.

Was he going to be here?

3 Defendant Weatherspoon: Your Honor, I have two attorneys. I have one, Tyce Smith, and I have another one, so I don't know which one was going to be here.

The Court: Well, one of them was supposed to be here, wasn't he?

Well, let's proceed with the arraignment on Charles Lee Wright, and you wait until your counsel comes. I will call the case again, and we will wait for your counsel to get here.

Mr. Kear: This is 74 CR 6, your Honor.

The Court: Yes, sir.

Mr. Kear: Are you Charles Lee Wright, named as a defendant in Indictment 74 CR 6?

Defendant Wright: Yes, sir.

Mr. Kear: Are you represented here by your attorney today?

Defendant Wright: Yes, sir.

Mr. Kear: Do you acknowledge having received a copy of indictment 74 CR 6?

Defendant Wright: Yes, sir.

Mr. Kear: Do you waive formal reading of that indictment?

Defendant Wright: Yes, sir.

Mr. Kear: How do you plead to the charge in that indictment?

Defendant Wright: Not guilty.

4 The Court: Let the plea of not guilty in 74 CR 6 be received and spread of record here in this court.

You will have your conference under Rule 2.04 on or before the—

Mr. Kear: Your Honor—

The Court: Yes?

Mr. Kear:—may we make it after February 4? I will be out of town next week on government business.

The Court: All right, on or before February 8. That is a little longer than I usually give, you know that, counsel.

Mr. Kear: Yes.

The Court: It is usually five days, but in view of your request—and the same would be granted to defense counsel if he were engaged otherwise.

All motions, counsel for the defendant, will be on file by February 13. I will call it for decision on such motions as may be pending on the 15th of February, and for such other orders as I deem proper at that time—such as setting it for trial—depending on the disposition of your motions.

All right.

Mr. Kear: I understand that your Honor will not want the government to answer unless you direct us to?

The Court: That is correct, or unless you deem that
5 you want to, and you may do so voluntarily.

Mr. Kear: All right.

Th Court: See that counsel gets a copy, though, of any answer you may file by way of a brief.

Mr. Kear: Of course.

The Court: All right.

Mr. Cleveland: Thank you, your Honor.

The Court: He has a bond, I gather?

Mr. Cleveland: Yes, sir.

Mr. Kear: Yes, sir.

The Court: It may stand—no objection, I take it?

Mr. Kear: No.

The Court: All right.

(Which were all of the proceedings had at the hearing of the within cause on the day and date hereof.)

6 (Certification of Official Court Reporter.)

1 TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the Hon. William J. Lynch, one of the judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, February 15, 1974, at the hour of 10:00 o'clock a.m.

Present:

Hon. James R. Thompson,
United States Attorney, by
Mr. Frank E. Kear,
Assistant U. S. Attorney,
on behalf of the government;
Mr. Herbert E. Cleveland,
on behalf of defendant Wright.

2 The Clerk: 74 CR 6, United States of America v. Charles Lee Wright, for decision.

Mr. Kear: Good morning, your Honor. Frank Kear for the government.

Mr. Cleveland: Good morning, your Honor. Herbert Cleveland for the defendant.

The Court: There were no motions filed in this matter.

Mr. Cleveland: Yes, they were filed, your Honor, on the 13th.

The Court: Where are they? We don't have them. We checked and we don't have any motions.

Mr. Kear: I didn't receive a copy of them.

The Court: Where did you file them, in the clerk's office?

Mr. Cleveland: In the clerk's office, your Honor.

The Court: When?

Mr. Cleveland: On the 13th.

The Court: The 13th of February?

Mr. Cleveland: Two days ago, yes, sir.

The Court: What kind of motions were they? Do you have copies of them?

Mr. Cleveland: Additional discovery—yes, sir.

The Court: Did you have your conference under 2.04?

Mr. Cleveland: Yes, sir, we did.

Mr. Kear: Yes, sir.

3 The Court: What didn't you give you that you should have?

Mr. Kear: I gave him everything that I was supposed to, Judge.

The Court: That's what you think.

Mr. Cleveland: I also filed, your Honor, a letter which I believe correctly summarizes our meeting.

This is the letter.

The Court: They must have gotten lost somewhere.

Mr. Kenneth Cunniff (law clerk): Judge, they were never docketed.

The Court: They were never docketed?

Mr. Cunniff: No, sir.

The Court: Who filed them for you, counsel—one of your law clerks?

Well, I am not going to hold up this whole court call just because your motion has been mislaid. I will put it to the end of the call.

See if you can find it for him, will you, Mr. Reed (law clerk)?

And you confer with him, and we will call it again very shortly.

Mr. Kear: Your Honor, I have a matter before Judge Will.

The Court: Come back afterwards, please.

Mr. Kear: All right, thank you.

4 (Whereupon the court gave its attention to other matters on the call, after which the following further proceedings were had herein:)

The Clerk: 74 CR 6, United States v. Wright.

The Court: Come up, counsel, please.

Did you find it, Tom?

Mr. Thomas Reed (law clerk): Judge, the docket clerk said he lost one of these, but he found it.

The Court: The docket clerk lost it. Well, that happens to the best of us.

All right, Mr. District Attorney, do you have any relevant written or recorded statements or confessions made by the defendant Charles Wright?

Mr. Kear: Not to my knowledge, your Honor.

The Court: Very well, that is answered.

You state that, of course, as the official representative of the government of the United States?

Mr. Kear: Yes, sir.

To my knowledge I have none of that information.

The Court: All right, sir.

You will of course pursue certain channels. If any information is—

Mr. Kear: Should any—

The Court: —available, you will see that it is given to the defendant's attorney.

Mr. Kear: Yes, sir, of course. I have already advised counsel that I would do so.

The Court: Any relevant results or reports or scientific tests or experiments made in connection with this case—do you have any?

Mr. Kear: The chemical analysis of the heroin, and I believe that has been provided—or if he doesn't have it, it is in the mail.

The Court: He will get it?

Mr. Kear: Yes, sir.

The Court: Make sure that he gets it.

3. Photographs, books, papers, documents, tangible objects, buildings or places which are the property of the defendant Charles Wright—do you have any of his property?

Mr. Kear: Not to my knowledge, your Honor.

The Court: That is answered. Please pursue it with your various sources.

Mr. Kear: Of course, your Honor.

The Court: If any of it should come to light, you will see that it gets into the hands of the defendant's attorney.

Mr. Kear: Yes.

The Court: Now, this was pursued and you refused it, and that was relevant statements or summaries made by the co-defendants.

You take that same position now, I gather?

Mr. Kear: Yes.

I could also advise the court that I do not at this time have that information.

The Court: Very well.

Mr. Kear: But should it become available—

The Court: Well, counsel has his answer.

Mr. Kear: However, I want to advise the court, should she for some reason decide to give us any, we would consider it 3500 material and would not tender it.

The Court: But you would tender it at the time of trial?

Mr. Kear: Of course, your Honor.

The Court: All right.

Now, any relevant statements or summaries of parties who are not government witnesses?

Mr. Kear: I know of none, no.

The Court: Not yet, counsel. Maybe in the course of the trial, if that appears, I would give you time of course to look at such statements.

Mr. Cleveland: How much time would I be given, Judge?

The Court: Oh, I don't know. Wait until we try the case. You will be given apt and reasonable time.

Certainly, having been out there myself a number of years, I know you can't read a twelve-page statement in the same time that you can read two, so there is no sense in giving you a definite statement of time.

The answer at this time is No.

A list of potential government witnesses—no, the court denies that.

Any photos used to identify the defendant Charles Wright?

Mr. Kear: Your Honor, the only photograph to my knowledge is one taken after his arrest, and I believe I showed counsel a copy of that.

The Court: That's complied with.

Mr. Cleveland: No, wait a minute, I haven't seen anything.

Mr. Kear: I showed you a Xerox copy.

The Court: So your motion is all complied with, counsel. That takes care of that.

Now, where are we? Are you ready to try the case?

Tell me a little bit about it, Mr. District Attorney. What is this?

Mr. Kear: The indictment—

The Court: We have it here as heroin, right?

Mr. Kear: The indictment alleges distribution of heroin.

The Court: One count. We can try it in a day.

Mr. Kear: Perhaps a day and a half, if it is a jury case.

The Court: All right. It is a late case. We will try
8 to give counsel a chance to get ready for trial.

Has Verda Mae Weatherspoon been apprehended?

Mr. Kear: Yes, your Honor. We had a pretrial conference with Mr. Walsh the other day regarding her.

The Court: Oh, yes, right, you did.

Have you had a pretrial conference, counsel?

Mr. Cleveland: That was going to be my next question, Judge.

The Court: Yes, sir.

Mr. Cleveland: May we have one?

The Court: Yes, of course you will.

What about maybe about the 20th of February, which is next week? Look at your schedule.

Mr. Kear: No, your Honor, I have a severed case before Judge McGarr. We are trying the defendants separately, and we are due to start on the 19th.

The Court: Well, what about the 26th?

Mr. Kear: I have a matter set before Judge Parsons on that day.

The Court: Well, he probably has you set for 10:00 o'clock. Why can't you come in and confer with me at 9:30?

Mr. Kear: Oh, I can come in at 9:30. I thought you were asking for a trial date, your Honor. I can come in at 9:30 on any of those dates.

The Court: Make it at 9:45. That will give you
9 both a chance. Make it at 9:45 sharp, on the 26th of February—

Mr. Kear: Fine.

The Court: —for pretrial conference.

Mr. Cleveland: Thank you.

The Court: All right.

Mr. Kear: Thank you.

(Which were all of the proceedings had at the hearing of the within cause on the day and date hereof.)

10 (Certification of Official Court Reporter.)

1 TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the Hon. William J. Lynch, one of the judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, February 26, 1974, at the hour of 10:00 o'clock a.m.

Present:

Mr. Herbert E. Cleveland,
on behalf of defendant Wright.

The Clerk: 74 CR 6, United States of America v. Wright, for pretrial conference.

Mr. Cleveland: Good morning, your Honor.

The Court: Oh, I'm sorry to have kept you waiting, counsel, this morning.

Mr. Cleveland: That's all right, your Honor.

The Court: But I was tied up.

Mr. Cleveland: Mr. Kear got tied up and had to go to Judge Bauer. He said he would be down shortly.

The Court: You can understand why I was tied up?

Mr. Cleveland: Yes, sir.

The Court: Now, you represent Charles Lee Wright, sir?

Mr. Cleveland: Yes, sir.

The Court: And the other defendant. Weatherspoon, what is the posture of that case?

Mr. Cleveland: I have been given to understand, your Honor, that she pleaded guilty.

The Court: Yes, she did. I wanted to be refreshed. And you want to talk about your defendant?

Mr. Cleveland: Yes, sir.

The Court: Do you want to come in right now?

Mr. Cleveland: Yes, sir.

The Court: All right.

The case on trial, I want to see the lawyers in that case too, as soon as I finish this conference.

(Which were all of the proceedings had at the within hearing on the day and date hereof.)

(Certification of Official Court Reporter.)

TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the Hon. William J. Lynch, one of the judges of said

court, in his courtroom in the United States Courthouse, Chicago Illinois, on Thursday, March 28, 1974, at the hour of 10:00 o'clock a.m.

Present:

Hon. James R. Thompson,
United States Attorney, by
Mr. William J. Schilling,
Assistant U. S. Attorney,
on behalf of the government;
Mr. Herbert E. Cleveland,
on behalf of defendant Wright.

The Clerk: 74 CR 6, United States of America, v. Charles Lee Wright, for plea or to set for trial.

Mr. Cleveland: Good morning, your Honor. Herbert Cleveland, appearing for the defendant Charles Wright.

At this time Mr. Wright would like to withdraw his plea of not guilty and enter a plea.

The Court: Of guilty?

Mr. Cleveland: Yes, sir.

Mr. Schilling: Your Honor, William Schilling, on behalf of the government. I don't believe that I have had the pleasure of appearing in this court before.

The Court: Yes, Mr. Schilling, you are welcome here. This is the first time you have been subject to our undue influence here.

Mr. Schilling: I am replacing Mr. Frank Kear, who has joined the Strike Force in San Francisco, California.

The Court: Is that so?

Mr. Schilling: I am sure he has better weather than we have today.

The Court: Well, you never know about San Francisco. I tried my first federal case in San Francisco in 1937, and it rained all the time that I was there. But it is a beautiful city.

But, you are welcome here, of course.

3 Mr. Schilling: Thank you, your Honor.

The Court: Now, you are offering a plea of guilty as to Charles Lee Wright, as to count 1 of this indictment, is that right?

Mr. Cleveland: That is correct, your Honor.

The Court: You are Charles Lee Wright?

Defendant Wright: Yes, sir.

The Court: How old a man are you, sir?

Defendant Wright: Thirty-one, sir.

The Court: You know—you have been advised by your counsel and the court does now advise you that you are entitled to a jury trial in this case.

Do you know and understand that, sir?

Defendant Wright: Yes, sir.

The Court: Do you waive that right? Do you?

Defendant Wright: Yes, sir.

The Court: In the absence of a trial by jury, you would be entitled to a trial by this court—that is by me in this instance. Do you waive that right?

Defendant Wright: Yes, sir.

The Court: Has anyone threatened you in order to get you to plead guilty to this charge?

Defendant Wright: No, sir.

The Court: The maximum sentence on this, Mr. District Attorney, is—

4 Mr. Schilling: The maximum sentence, your Honor, is fifteen years and/or a $25,000 fine. There is a three-year special parole condition.

The Court: Parole, yes.

You have heard the district attorney advise the court upon the court's inquiry, that I can impose a fifteen-year sentence and a $25,000 fine, or both, and on any sentence that I impose a mandatory three-year parole period follows it.

Defendant Wright: Yes, sir.

The Court: Do you understand that? Do you?

Defendant Wright: Yes, sir.

The Court: Do you still offer your plea of guilty here, sir?

Defendant Wright: Yes, sir.

The Court: Let me read this to you, and pay attention to it:

> "The December 1973 Grand Jury charges that on or about March 26, 1973, at Chicago, in the Northern District of Illinois, that Charles Lee Wright and Verda Mae Weatherspoon, defendants herein, knowingly and intentionally did distribute approximately 13.78 grams of a mixture containing heroin, a Schedule I narcotic drug control substance, in violation of Title 21, United States Code, Section 841(a)(1)."

5 You did that, did you, Mr. Wright?

Defendant Wright: Yes, sir.

The Court: And you plead guilty to that count?

Defendant Wright: Yes, sir.

Mr. Schilling: Your Honor—

The Court: Yes, I was just reading it—go ahead.

Mr. Schilling: —if the government might interject at this point—I hate to interrupt.

The Court: That's all right.

Mr. Schilling: But in cases of this kind, I normally request the court to ask if at the time of the plea the defendant had been taking any narcotics.

The Court: I am glad you did, and I appreciate your suggestion, because I was reading it from the other standpoint on the particular section of that parole.

Mr. Wright, when was the last time you used any narcotic drugs?

Defendant Wright: I never have.

The Court: You never have.

Well, fine, that's all I want to know, because when you appear before the court and make a plea, we want to make sure, because the subject matter here is drugs, and if you have used any recently—of course, anyone wouldn't accept your plea—I would not accept it.

Defendant Wright: Yes, sir.

6 The Court: Therefore, based on the answers that have been made to the questions put to the defendant Charles Lee Wright, I will accept your plea of guilty and it will be spread of record in this case, No. 74 CR 6.

A presentence investigative report—your motion, sir? Do you want one?

Mr. Cleveland: Yes, I would, your Honor.

The Court: I would think so, in this type of a case. I will order a presentence investigative report.

Mr. Clerk, when is it returnable?

The Clerk: May 7, your Honor.

The Court: May 7. You will be here on May 7, at 10:00 o'clock.

Is he on bond?

Mr. Cleveland: Yes, sir.

Mr. Schilling: Yes.

The Court: Any objection?

Mr. Schilling: No objection, your Honor.

The Court: It may stand.

May 7, at 10:00 o'clock.

Mr. Schilling: Thank you, your Honor.

Mr. Cleveland: Thank you, Judge.

Mr. Schilling: I hope I will appear before you many times in the future.

The Court: Yes, please do.

(Which were all of the proceedings had at the within hearing on the day and date hereof.)

7 (Certification of Official Court Reporter.)

1 TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the Hon. William J. Lynch, one of the judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, May 7, 1974, at the hour of 10:00 o'clock a.m.

Present:

Hon. James R. Thompson,
United States Attorney, by
Mr. William J. Schilling,
Assistant U. S. Attorney,
on behalf of the government;
Mr. Herbert E. Cleveland,
on behalf of defendant Wright.

2 The Clerk: 74 CR 6, United States of America v. Charles Lee Wright, for disposition.

Mr. Cleveland: Good morning, your Honor. Herbert Cleveland, on behalf of Charles Wright.

Mr. Schilling: William Schilling, on behalf of the United States.

The Court: It is here for disposition. This is Charles Lee Wright here in open court?

Mr. Cleveland: Yes, sir.

The Court: All right, you may say what you would like to say, counsel, in mitigation of this serious matter.

Mr. Cleveland: Your Honor, if the court please, I would similarly remind the court—perhaps you recall the pretrial—

The Court: Yes.

Mr. Cleveland: —at which time the court indicated a disposition or inclination toward probation. However, there was a question as to the presentencing report. I have not seen that report, your Honor. I understand there is one.

The Court: Yes, there is one. I have it.

Do you have a motion?

Mr. Cleveland: I made the motion at the last setting for a copy of the report, your Honor.

The Court: Let the record reflect that here in open court a copy of the probation report of Charles Lee
3 Wright is handed to counsel for the defense and for the defendant.

We will call it in another few moments after you have had a chance to examine it.

Mr. Cleveland: Thank you, your Honor.

(Whereupon the court gave its attention to other matters on the call, after which the following further proceedings were had herein:)

The Clerk: 74 CR 6, United States of America v. Charles Lee Wright, for disposition.

Mr. Schilling: Your Honor, William Schilling, on behalf of the United States.

Mr. Cleveland: Herbert Cleveland, on behalf of the defendant.

The Court: All right, counselor, you may speak in mitigation, if you so desire.

Mr. Cleveland: Thank you, your Honor.

Your Honor, I have in the interim period had an opportunity to examine the presentencing report, and I find that that report reflects quite accurately the circumstances that brought Mr. Wright—that brings Mr. Wright here today.

Mr. Wright, respectfully, your Honor, was a CTA bus driver for some five years and gainfully employed, living otherwise a model-type citizen's life, at which
4 time a charge was made against him. The matter was quite protracted. I believe he attended various court hearings for over—I believe for over two years—some thirty-one different—

The Court: Where was this?

Mr. Cleveland: This was in the state court, your Honor, 26th Street, I believe.

In any event, he was exonerated on that particular charge, but because of the charge he found himself in rather financial straits during the pendency of that action.

He was removed from the CTA during the pendency of the action, and incidentally, as the presentencing report indicates, he has an appeal with the Labor Board pending, seeking reinstatement of his employment and also seeking back wages.

He just otherwise, though, was leading a rather model existence. He apparently fell into some sort of bad company under the aegis of the financial strain, and because of the so-called "quick money" he got into this.

The incident out of which this charge arose was of no great significance, your Honor; however, he certainly understands the gravity of it, the severity of it, the serions nature of it, and I also notice the remark made in the presentencing report that Mr. Wright's exterior is cool, and I would respectfully submit to your Honor from personal knowledge, Mr. Wright is quite remorseful. He is quite unhappy with his present situation and has made—at least to me—every indication of an attempt to make himself a useful and good citizen, as it were.

He has an honorable discharge from the military. That was four years in which he was without incident. He has no record.

I understand—I note a criminal record that indicates that the charge in England—it doesn't show a conviction—however, I see in the presentencing report there is a conviction noted, but that was a misdemeanor, your Honor.

The Court: Twenty-five pounds he was fined.

Mr. Cleveland: That's about it, Judge.

That's all I have to say.

The Court: Mr. District Attorney, what if anything do you have to say in aggravation of this case?

Mr. Schilling: Your Honor, this is indeed a serious crime, and I would point out your Honor's attention to that portion of the presentence report, which is entitled Remarks of the Prosecution.

The Court: Yes, I read it.

Mr. Schilling: The significance of this case—I did indeed draft that and provide it to the Probation Office.

It indicates—the case indicates to me that Mr. Wright was prepared to supply to people on the street

heroin, which is indeed a very serious narcotic drug, of a significant strength and in significant quantities.

From the report it is indicated that Wright said it was Weatherspoon, and Weatherspoon says it was Wright, but I think we have—the government contends—enough indication that indeed Wright was the major supplier, if there is someone to be labeled the major supplier in this case—as the agent had just talked to Wright on the day he was arrested, and Wright said, well, further dealings are going to have to be through Weatherspoon and I am bringing the stuff over now, and indeed, when they arrived, his female companion at that time was carrying a significant quantity of heroin.

I do not think that this court can ignore the fact that he was an upper level—at least within this conspiracy or crime—an upper level dealer, and that he was prepared to deal in significant amounts.

In light of that, your Honor, I would have to say that the government would feel that probation, straight probation, would be inappropriate.

The Court: Do you care to add anything to your report?

The Probation Officer: I have nothing to add to my report, your Honor.

The Court: Mr. Charles Lee Wright, under the law and the custom of this court, you may make a statement to the court if you so desire.

You may do so now.

Defendant Wright: Well, your Honor, the only thing I have to say, that the charge I am pleading guilty to, my only reason for pleading guilty to it was not that I committed the crime. I put myself in the

position where I totally could not defend myself because the only thing—the only defense I have—

The Court: Well, you pleaded guilty because you are guilty, aren't you?

Defendant Wright: No, sir.

The Court: Well, you were with Weatherspoon. She's already said so.

Defendant Wright: But, your Honor, if I thought that she would tell the truth, then I would never have pleaded guilty, or if her word had stood up, because even when we come to court—

The Court: Well, you were fully informed.

Defendant Wright: —and the district attorney said that they wouldn't even use her on account of—her worth here would only be considered—I think he said thirty per cent. So, how could I use her for my defense to say that I never seen the man in my life?

The Court: Don't ask me those questions. You
8 should have thought of those before you came in here.

Defendant Wright: Yes, sir.

The Court: You were convicted of a crime in London, weren't you?

Defendant Wright: Yes, sir.

Would you like for me to explain that, sir?

The Court: Well, of course I would. Go ahead, tell me about it.

Defendant Wright: In London the law states that a person that profits from prostitution in any way is guilty of pandering.

The Court: Of pandering?

Defendant Wright: Yes.

The Court: There is a law here too that says that.

Defendant Wright: But the only way I profited was the fact that we shared an apartment, and she

paid half the rent and I paid half the rent, so I made myself be guilty.

The Court: You were charged with rape here in Chicago, but you were—

Mr. Cleveland: He was acquitted of that, Judge.

The Court: —you were acquitted of that.

When was the last time you used any heroin?

Defendant Wright: I never used it in my life.

The Court: Did you live with Miss Weatherspoon?

Defendant Wright: No, sir.

9 The Court: You did tell the agent, though, the undercover agent of the government, that all future dealings would be through Weatherspoon and that you were on your way to deliver the heroin to her.

You did deliver the heroin to her, according to the undercover agent.

I herewith remand you to the custody of the Attorney General of the United States for three years, to be followed by the mandatory requirement of three years parole, under the supervision of the Prison and Parole Board.

That's all. Take him in custody.

Mr. Cleveland: Your Honor, would you entertain a suspended sentence with regard to Mr. Wright?

The Court: No, not in this instance.

Defendant Wright: Your Honor, could I say something?

The Court: No, you have had your say.

Defendant Wright: Could I have a little—

(Whereupon the defendant was taken into custody.)

The Court: What else?

Mr. Cleveland: Would it be possible, your Honor, to get some time for him to get his affairs in order? Maybe a week?

The Court: Is he on bond? I will increase his bond.

How much is it?

10 Mr. Cleveland: I don't know that he could make the increased bond, your Honor. It is forty-five hundred.

The Court: You have got a man here that is sentenced under a conviction, and in his case he is footloose. You can come in on a motion, counsel, but I will have to increase his bond. I don't know what the bond is.

The Probation Officer: It is $4500, your Honor.

The Court: Surety?

Mr. Schilling: Secured, at the present time, yes, and the government would have to recommend a higher bond after sentencing.

The Court: I would think so.

Counsel, the incentive to run under such circumstances—I would increase the bond on the basis of the sentencing, to $7500, surety.

Mr. Cleveland: You mean his bond will be $7500?

The Court: Yes, sir.

Mr. Cleveland: Then could he have, say, ten days, a week?

The Court: If he goes on bond I would give him ten days, of course, to clear up his affairs, if he can make that bond.

Mr. Cleveland: Thank you, your Honor.

The Court: Explaining to him, of course, counsel, that if he violates the bond of course it only goes that
11 much harder on him.

Mr. Cleveland: Yes, sir.

Thank you, your Honor.

(Which were all of the proceedings had at the hearing of the within cause on the day and date hereof.)

12 (Certification of Official Court Reporter.)

1 TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before the Hon. William J. Lynch, one of the judges of said court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, May 17, 1974, at the hour of 10:00 o'clock a.m.

Present:

Mr. Herbert E. Cleveland,
on behalf of defendant Wright.

2 The Clerk: 74 CR 6, United States of America v. Charles Lee Wright, motion to reduce sentence.

Mr. Cleveland: Good morning, your Honor.

I wonder if you could pass this for Mr. Schilling. He will be back in just a moment.

The Court: Who, the district attorney?

Mr. Cleveland: Mr. Schilling.

The Court: Yes. I want to pay attention to this. I want to take it—actually, I can save you the time. I think you've told me pretty much what you want to tell me about this defendant, and I told you—I practically invited your motion because I wanted to look at it. I want to re-examine the presentence report.

There is no sense in you waiting, and I will tell Mr. Schilling that, and if there is anything he wants to say to me further—he may, but I think I've heard his story, but it was a question because of another defendant in this case that I want to reappraise what I did.

So, I am taking this motion under advisement, and that probably will be answered—I will make a decision on it by Tuesday or Wednesday of next week.

Mr. Cleveland: Well, he has to surrender on Tuesday, your Honor, Tuesday morning.

The Court: Well, supposing he does—he is not going to be put on the street, I can assure you of that.

3 Mr. Cleveland: Oh, all right.

The Court: But let him surrender. I mean, that doesn't affect what I might do. It says, "Reduce".

Mr. Cleveland: Yes, sir.

Thank you, Judge.

The Court: All right.

(Which were all of the proceedings had at the hearing of the within cause on the day and date hereof.)

4 (Certification of Official Court Reporter.)

APPENDIX D

Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 21, United States Code § 841(a)(1)

Prohibited Acts A-Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense, a controlled substance;

Title 18, United States Code
Federal Rules of Criminal Procedure, Rule 11

Pleas

A defendant may plea not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first *addressing the defendant personally and* determining that the plea is made voluntarily with understanding of the nature of the charge *and the consequences of the plea.* If a defendant refuses to plea or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a judgment upon a plea of not guilty. *The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.* As amended Feb. 28, 1966, eff. July 1, 1966.

[The portions of the Rule in italics are the additions to the Rule which constitute the Amendment of February 28, 1966 which became effective July 1, 1966.]

Supreme Court, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR., CLERK

No. 74-1408

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES LEE WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his plea of guilty was involuntary because it was induced by the district court's unfulfilled promise that petitioner would be sentenced to probation and because he did not understand the nature of the charges against him.

Petitioner pleaded guilty in the United States District Court for the Northern District of Illinois to an indictment charging him and one Vera Mae Weatherspoon[1] with having distributed heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to three years' imprisonment, to be followed by a three-year term of special parole.[2] The court of appeals affirmed (Pet. App. 1a-5a) in an opinion reported at 510 F.2d 976.

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[1]Co-defendant Weatherspoon also pleaded guilty.

[2]The maximum permissible sentence under the statute is 15 years' imprisonment.

1. Eight days after sentence was imposed, petitioner's trial counsel filed a motion in the district court to reduce sentence. The motion was accompanied by an affidavit in which counsel stated that a conference between defense counsel and the court was held one month prior to entry of the guilty plea at which the court had indicated an "inclination and disposition to grant the defendant probation in the event the defendant was to plead guilty to the charge, but dependent on a presentence report" (R. 33). Trial counsel's affidavit also recited that the court had indicated that there was no "binding effect" to that inclination (*ibid.*).The district court denied petitioner's motion for a reduction of sentence. Petitioner never subsequently sought to withdraw his guilty plea pursuant to Rule 32(d), Fed. R. Crim. P., or 28 U.S.C. 2255.

On appeal, petitioner's appellate counsel[3] argued that petitioner's plea was not voluntary because it was induced by the judge's unfulfilled promise of probation.[4] Because the court of appeals found that "[petitioner] has made no factual allegations of a promise, and the allegation that any promise was made at all rests on questionable speculation indulged in by [petitioner's] appellate attorney" (Pet. App. 3a), it concluded that no evidentiary hearing was required. In view of the district judge's clear admonition that his preliminary inclination towards probation was not binding, and since there was no reason to suppose that trial counsel

[3]Petitioner was represented by new counsel on appeal.

[4]As the court of appeals noted (Pet. App. 3a), the district court had no occasion to rule on that argument since petititoner never filed a motion to withdraw his guilty plea.

misled petitioner concerning the import of the judge's remarks, that ruling was plainly correct.[5]

Petitioner further claims that the trial court erred by not asking him whether his guilty plea had been induced by promises. However, so long as the court assures itself that the plea is made voluntarily, as it did here, there is no requirement that it expressly determine that no promises have been made.[6] Even the proposed amendments to Rule 11 now before Congress (see H.R. 6799) deal with disclosure of promises by the government to defendants, not with discussions between the court and defendants as to possible sentences. Since it is a participant in the latter case, the court already will be informed of any such agreement.

Here the district judge, having expressly stated to defense counsel that his inclination towards probation was "not binding," was well aware that he had made no promises and did not need to question petitioner to establish that fact. Before accepting petitioner's guilty plea the judge stressed that he could impose a 15-year prison term, and petitioner stated that he nonetheless wished to plead guilty (Pet. App. 23a). In those circumstances, petitioner was not prejudiced by the district court's failure to inquire specifically whether the plea had been induced by promises.

[5]As the court of appeals pointed out, *United States* v. *Mancusi*, 275 F. Supp. 508 (E.D. N.Y.), relied upon by petitioner, is distinguishable because the facts there suggested that defense cousel might have misled the defendant. There is no similar indication or allegation here. Indeed, there has been no showing that petitioner's, trial counsel conveyed a "promise" from the court to petitioner and that this promise induced the plea of guilty; petitioner's argument is based only on a contention that it is "reasonable to infer" that such a "promise" was conveyed. See Pet. App. 2a-3a.

[6]As the Seventh Circuit noted in tis opinion (Pet. App. 2a-3a, n. 3), that Circuit, in anticipation of congressional approval of proposed amendments to Rule 11, Fed. R. Crim. P., which would require disclosure in open court of plea agreements reached by the parties, has instructed district judges to ask the government and defendants whether there have been plea negotiations. See *Moody* v. *United*

2. The court of appeals also properly rejected petitioner's contention that the district court did not adequately determine that he understood the nature of the charges.

Rule 11 does not require that the court follow any particular ritual in determining that the defendant comprehends the charges against him. *McCarthy* v. *United States*, 394 U.S. 459, 467, n. 20. Here, after reading the indictment to petitioner, the trial court asked him whether he did the act charged and whether he was pleading guilty. Petitioner responded affirmatively to both questions. As the court of appeals held (Pet. App. 5a), since the offense charged was not complex and in view of the presence of counsel, the court's inquiry, combined with the reading of the indictment, satisfied the requirement of Rule 11 that the court ascertain that the defendant understands the nature of the charge. See *Paradiso* v. *United States*, 482 F.2d 409, 413-414 (C.A. 3); *Sappington* v. *United States*, 468 F.2d 1378, 1379-1380 (C.A. 8), certiorari denied, 411 U.S. 970.[7]

Petitioner also points to the subsequent sentencing hearing, at which he asserted tha' he was innocent and that he had pleaded guilty only because his defense was weak. On appeal, he argued that these protestations demonstrated that his plea was involuntary. However, the court of appeals correctly held that "[w]here there exists a factual basis for the plea, a plea of guilty can be found to be voluntarily, knowingly, and understandingly entered even though the defendant asserts his innocence or is simply selecting his least harmful alternative under the circumstances"

States, 497 F.2d 359, 365 (C.A. 7). That requirement, imposed by the court of appeals under its supervisory authority, is not applicable, however, to petitioner's guilty plea, which was entered before the instruction was issued to the lower courts.

[7]Petitioner asserts that *Heiden* v. *United States*, 353 F.2d 53 (C.A. 9), conflicts with the decision of the court of appeals. However, in *Heiden* the district judge failed to ascertain before judgment was entered that the defendant understood the charges against him, and the Ninth Circuit simply held that a subsequent finding of knowledge at a hearing on a motion filed pursuant to 28 U.S.C. 2255 could not cure that deficiency. The situation here is entirely different.

(Pet. App. 5a). See *North Carolina* v. *Alford*, 400 U.S. 25, 38. Petitioner's presentence report (see *McCarthy* v. *United States*, *supra*, 394 U.S. at 463, n. 6), and his statement to the court, after hearing the indictment read, that he did the act charged, together established a factual basis for the guilty plea. The district court therefore properly accepted the plea despite petitioner's protestations of innocence at the sentencing hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.